Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

HUDSON T. HARRISON and HARRISON CONSTRUCTION INCORPORATED, a corporation, and THOMAS P. WARD,

Cross-Petitioners,

v.

DEAN WITTER REYNOLDS, INC., a corporation,

Cross-Respondent.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in affirming summary judgment dismissing claims against a securities broker-dealer that its employee-agents acted with apparent authority, where the record showed plaintiffs were two of 125 investors who invested more than $7 million in reliance upon the truth of what proved to be fraudulent misrepresentations by defendant's employee-agents?

2. Whether the Seventh Circuit erred in ruling, based on Rule 3(c), Fed.R.App.P. and *Torres v. Oakland Scavenger Co.*, that it was without jurisdiction to review Rule 11 Fed.R.Civ.P. sanctions because the notice of appeal, as originally filed, omitted the name of the attorney against whom the Rule 11 sanctions were entered?

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OPINIONS BELOW

This Cross-Petition involves the same opinion which is the subject of a Petition for Writ of Certiorari filed in No. 92-1586. The opinion of the United States Court of Appeals for the Seventh Circuit (W.P.App. 1-27)[1] is

[1] Reference is to Witter Petition for Writ of Certiorari Appendix in No. 92-1586 ("W.P.App. ___"). Other citations to the record are to Plaintiff-Appellant's Appendix in the Seventh Circuit (App. ___), to the various depositions are John Kenning

reported at 974 F.2d 873 (7th Cir. 1992). The opinion of the United States District Court for the Northern District of Illinois (W.P.App. 28-55) is reported at 715 F.Supp. 1425 (N.D. Ill. 1989).

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1992. A petition for rehearing was denied on December 28, 1992. Witter's Petition for Writ of Certiorari was filed March 29, 1993, and received the following day.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RULES INVOLVED

Part I of this Cross-Petition involves application of the common law of agency and findings made in respect thereto which are claimed to be violative of Rule 56(c), Federal Rules of Civil Procedure:

Rule 56. Summary Judgment.

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing

---

(K. ___), John Carpenter (C. ___), Richard Frost (F. ___), Hudson T. Harrison (H. ___).

affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Part II involves the application of Rule 3(c), Federal Rules of Appellate Procedure.

Rule 3. Appeal as of Right – How Taken.

* * *

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

Summary Judgment – Apparent Authority

Plaintiff, Hudson T. Harrison, claimed he was entitled to recover his losses from Dean Witter Reynolds, Inc. ("Witter") based on the common law agency principle of "apparent authority", as well as on Section 20(a) of the

Securities Exchange Act. The Seventh Circuit reversed summary judgment depriving him of a jury determination based on §20(a), but it affirmed the district court's holding that a jury would *not* be allowed to decide whether Witter's employees had apparent authority to do what Harrison and 125 other victims believed they had authority to do. The Court of Appeals held Illinois law governed, and under Illinois decisions, Kenning and Carpenter lacked apparent authority *as a matter of law.* (W.P.App. 19).

The Court below correctly selected, and erroneously applied, the law stated in *State Security Insurance Company v. Burgos,* 145 Ill.2d 423, 583 N.E.2d 547, 551 (1991). (W.P. App. 17). Witter, the principal, will be bound by the authority it appears to give to another, in situations where it creates by conduct the reasonable impression that its agents-employees have been granted authority to perform certain acts.

> **Apparent authority is that authority which a reasonably prudent person, in view of the principal's conduct, would naturally suppose the agent to possess.** (W.P. App. 17, quoting *Burgos.*)

It is undisputed that 125 persons did believe Vice President John Kenning had authority to receive and apply more than $7 million, which these people invested through him, in a bond fund made specially available by Witter to attract and retain sales persons who were large producers of gross income. (App. 59-87) . On summary judgment, we respectfully submit, it cannot be said that no reasonably prudent person could have so believed.

Facts in the record show Witter's conduct included the following. It hired Kenning only days after his previous employer, Prudential Bache Securities, had fired him because of his alleged initiation (in its Boca Raton branch) of a fraudulent scheme.[2] Witter went further; it paid Kenning $50,000 in front money to persuade him not to take his production to a competitor. (App. 155-159; F. 239-40). Next he was made a vice president, and furnished with business cards so identifying him. It housed him, and his young associate John Carpenter, in its Boca Raton (FL.) branch, where the persons he defrauded could, and did, contact him whenever they needed to discuss the investment program they believed they were in. The telephone receptionists identified the call receiver as "Dean Witter Reynolds", and calls were promptly put through to Kenning.

The fraud is described more fully at Respondents' (Harrison's) Brief in Opposition, No. 92-1586, pp. 3-5, 9-12. Witter had plenty of reason to inquire into where its registered salespersons, Kenning and Carpenter, were getting the approximately $3 million that passed through Carpenter's Dean Witter account in the next 30 months. Operating only a few feet from the office of Branch Manager Frost, Kenning frequently bought thousands of put contracts in Carpenter's account. (K. 152, App. 100-143). Carpenter had never been registered before he came with Kenning from Pru-Bache (where he had been Kenning's unregistered sales assistant), had never had a job paying more than $5.00 per hour (F.Ex. 83, C. 12, 17) and claimed

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[2] Described in *Finn v. Prudential Bache Securities, Inc.*, 821 F.2d 581 (11th Cir. 1987); Kenning is identified in the opinion.

liquid net worth of $25,000 (App. 166), yet his account was the vehicle through which Kenning bought 97,000 put contracts on the Standard and Poors 100 Index ("OEX puts"). Frost required cash settlement for every Carpenter purchase the day it was made. (K. 290). The account sustained a net loss of $1,844,000, and required every transaction to be initialed by the Branch Manager. (F. 654). Kenning was clearly not the source of the funds; he told Frost in the first few months he was at Witter that he would file bankruptcy, he did so, and was discharged all while the fraud was in progress. (K. 84, P.Dep.Ex. 56). Witter knew these facts, but Harrison and the other investors did not.

Kenning told them their money was being applied to settle purchases of municipal bonds in a Witter program designed to attract and retain the firm's largest producers. (K. 69-71). He and Carpenter were among those directly eligible, and the participations were carried in the names of the Witter-selected producers. (K. 69-71, 501). The program produced significant tax-free income and capital gains in short time periods. The size of purchases in his and Carpenter's name could be increased by funds obtained from persons such as Harrison, a practice he claimed Witter permitted. (H. 457) Kenning told the investors he had more of his own money in these bonds than did anyone who provided supplemental cash. (K. 71-72, 4-18-88). The practice was, he said, to pay investors the tax-free part of the profits on participations they supported, Kenning and Carpenter retaining the taxable capital gains on positions so financed. (K. 492). The investors were advised to send checks to Carpenter for deposit

in his bank account,[3] from which the funds would be paid to Witter as needed to satisfy bond purchases. One hundred twenty-five persons who heard Kenning's presentation between January 1984 and July 1986 believed it, and provided more than $7 million dollars to what they thought was a Witter program. Harrison was the largest investor and the largest loser, his net loss being $3,229,000.

Appellate Jurisdiction –
Rule 11 Sanctions

The district judge, who granted the motion for summary judgment, soon thereafter entered *sua sponte* a stay of all proceedings until Kenning and Carpenter were released from prison. While this stay continued, the case was transferred to a second district judge who, in response to a Witter motion, awarded Rule 11 sanctions against Harrison's attorney (Ward), based on two complaint counts out of twelve pleaded. Witter was informed in October 1990, five months before the case became appealable, that whenever the stay of proceedings was lifted, the Rule 11 sanctions would be appealed. (Harr. Rep. App. B).

The stay was lifted the following February. The notice of appeal listed in the caption and in the body of the notice all *parties* who were appealing the judgment of the district court, but omitted the name of the sanctioned

---

[3] There is no evidence that Harrison or anyone else was told the money would be placed in Carpenter's employee account at Witter, as the Seventh Circuit's opinion suggests. (W. P. App. 19). See, K. 500.

attorney. The Jurisdictional Statement required by the Seventh Circuit was filed within the 30-day period for appeal, and it expressly declared the appeal included the October sanctions. Plaintiff's Jurisdictional Statement, filed March 6, 1991, lists the Rule 11 sanction imposed against Plaintiffs' attorney as one of the two final orders being appealed.[4] This Statement was filed within the 30-day period for appeal which expired on March 8. The attorney's name is on the Notice of Appeal above his signature; he has never been a party named in the caption of the case.

REASONS FOR GRANTING CROSS-PETITION

I. AFFIRMING SUMMARY JUDGMENT ON THE "APPARENT AUTHORITY" COUNTS IS A GLARING DEPARTURE FROM ACCEPTED AND USUAL JUDICIAL PROCEEDING.

On the specific facts shown by Harrison, the Seventh Circuit ruled that no question was presented for a jury's determination. It found as a matter of law that no reasonably prudent person could have believed Witter would have permitted Harrison to benefit as Kenning claimed. The transactions were, as a matter of law, "not regular on their face". (W.P.App. 19). We respectfully submit the rulings of all circuits on the application of Rule 56(c),

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[4] Attorney Thomas P. Ward was ordered to pay to defendant-appellant the sum of $20,860.50 as a sanction for violation of Rule 11, F.R.C.P. on October 19, 1990. The stay remained in effect until February, 1991. Jurisdictional Statement, March 6, 1991, App. Jur. Statement, Par. 2(i)(b)).

Fed.R.Civ.P. and the law of agency affords plaintiffs a right to have reasonable belief, or lack thereof, determined by a jury.

The Seventh's Circuit's holding has so far departed from the accepted and usual course of judicial proceedings that the Supreme Court's power of supervision is called for. That fact-intensive issue of "apparent authority" was dismissed on summary judgment, though jury trial was demanded. "Apparent authority" principles established by the Illinois state court of last resort were held to govern this question. (W.P. App. 15-16). The holding on a motion for summary judgment, that no "reasonably prudent person" could believe these employee-agents had authority to solicit the investments they so successfully did solicit (Id. 19), is contradicted by Illinois law, and is contrary to principles applied in all federal courts when applying Rule 56(c), Fed.R.Civ.P.

Summary judgment will not be granted unless the moving party establishes there is no genuine issue as to any material fact and it is entitled to a judgment as a matter of law. Rule 56(c). The opposing party is obligated to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The appellate tribunal reviews the showings *de novo*, and is obligated to reverse summary judgment if such specific facts have been shown; it must view those facts in the light most favorable to the non-moving party. *Prince v. Zazove*, 959 F.2d 1395, 1398 (7th Cir. 1992).

The Seventh Circuit has determined what a reasonable person could believe after considering facts that caused a large number of *actual* people to believe the

exact opposite. They believed an employee-agent of a principal in the business of selling securities had authority to sell them a security. There can be no question that a right to receive the tax-free income generated by municipal bonds is a security. Harrison and many others provided this agent with the investment funds required, and received back evidence of their investments. These were promissory notes, which are themselves securities. The notes did not purport to be issued by Witter, but rather by the agent in an investment program the agent stated was created and maintained by the principal as an incentive for himself and other agents who contributed to the principal's success.

The "no reasonably prudent person" finding is based on three sub-findings. One of them has no support in any showing by either side, one is contradicted by both Harrison and one of the fraud perpetrators (Kenning), and the third is based on a fact the effect of which could reasonably cause a jury to reach a conclusion contrary to that reached by the panel. They are:

> 1. The victims (including Harrison) transferred money for the perpetrators to place in Carpenter's employee account at Dean Witter to be used for subsequent investment. (W.P.App. 18).
>
> 2. The victims (including Harrison) expected to benefit from lower commissions charged by Witter to employees, though the investors were not entitled to that benefit. (Id. 18-19).
>
> 3. The victims (including Harrison) did not open an account at Witter. (Id. 18).

The finding that investors intended their funds to be deposited in Carpenter's Witter account is baseless; not one person thought that. (K. 500). The investors were told by Kenning that funds should go to Carpenter's *bank* account, and that they would be promptly applied to the purchase of a specific municipal bond issue, identified by issuer, maturity date and coupon. These "confirmations" were notes which promised to pay the investor a fixed amount on a date certain. (Witter Ct. of App. Appendix, Tab 20). There was never a time Harrison was told, or assumed, he was funding John Carpenter's Dean Witter account.

If a jury could find that a reasonably prudent investor could believe Witter had a program such as Kenning described, that record participation in the program was required to be in the name of a registered chosen producer, that Witter had no objection to sharing some of the gain with persons whose cash supported larger positions for the principal beneficiaries (and thus increased his gain over what he would have realized without such additional capacity), and that Kenning's investment was larger than any fund-supplier's investment, it would support a conclusion that Kenning-Carpenter had apparent authority under case law.

The "lower commissions" observation is factually flawed and does not establish, or even tend to prove, the "no reasonably prudent person" conclusion. Kenning represented that Witter's bond traders were able, because the number of bonds acquired was so large, to buy the bonds near the "bid" price (in Kenning's words, "on the bid side"). (H. 476, K. 69). *There are no commissions on transactions in municipal bonds.* Municipal bonds are the

subject of "bid" quotations by dealers looking to buy, and "ask" quotations by those looking to sell. When a customer buys from a dealer, he pays the "ask" price (or close to it). The dealer tries to profit by selling bonds from its own inventory (which it has attempted to acquire at prices lower than the "ask"), or by offering another dealer a price at or near the "bid", then selling at the "ask" to its customer. The difference is the broker-dealer's "gross" on bond transactions.

The only benefit investors would realize from "bid-side" purchases was indirect. Kenning said the Witter traders could buy on the "bid side", which (had it been true) would have increased the capital gain when the bonds matured or were called. Kenning-Carpenter were to receive that portion of the profit. It would have no effect on the amount of tax-free coupon interest the investor was told made up the major part of the benefit he would realize. In summary, the Kenning assertion that bonds could be acquired at a lower than arms-length transaction-cost did no more than imply (falsely, as it turned out) why Kenning-Carpenter would share with others a portion of the profits from the putative pools.

The Seventh Circuit misunderstood a material fact relating especially to the "lower commission" conclusion which directly impacts both the "regular on its face" result and the statement that the Witter employees were not "seeking to benefit their employer." The footnote states:

> "5. While it may be argued that Dean Witter received commissions on the activity Carpenter's account generated, it must be noted the commission would have been greater had the

activity been in a regular customer's account." (Op. 17).

That statement is factually incorrect. The activity which would have occurred in a regular account in Harrison's (or any victim's) name would have been the purchase of municipal bonds at a time close to such bond's maturing. The commissions which actually benefitted Dean Witter were those generated by the purchase of OEX put contracts. There is a tremendous difference. Kenning-Carpenter bought 97,288 such contracts between January 1984, and June 1986. (Pl.App. 99). These purchases of OEX puts comprised more than 99% of the activity in the Carpenter account at Dean Witter. Witter's gross income on these 97,000 puts so purchased was $428,108. (Id.).

No dealer will gross as much as 3/8 of 1% on bonds sold to a customer within three to four months of maturity. Even assuming this unrealistically high average gross for such transactions on the purchases Harrison believed had been made for his benefit, Witter would have grossed less than $16,000. Harrison and his company provided more than one-half of all of the funds Kenning-Carpenter received from the 125 victims. Presumably not less than one-half of the amount Witter grossed on the Kenning-Carpenter OEX puts purchased arose from OEX put transactions made possible by Harrison's funds. That same money, paid to Witter from the Carpenter account (as it was paid, in fact), produced gross income to Witter of at least $212,000, or 13 times what it would have produced "in a regular customer's account".

It cannot be said that Kenning and Carpenter *did* not benefit the employer by generating more than $200,000 in commissions on funds obtained from Harrison as these were. It makes no legal difference whether, in so doing, they were "seeking to benefit the employer". (W.P.App. 17). The Supreme Court established that a principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 567 (1982). The rule in the federal system is that an employer is liable for the fraud of his agent, though the employer could derive no benefit therefrom. Id., citing *Gleason v. Seaboard Air Line R. Co.*, 278 U.S. 349, 356 (1929). The question – and it is a jury question – is did the perpetrators have *apparent* authority?

Finally, what is the relevance to an "apparent authority" analysis of the investor not being the recipient of documents showing he had a Witter account? We respectfully assert that at the summary judgment stage, it is of no possible significance on this record. The absence of account papers goes to what a reasonable person could believe, and that is everywhere a question for a jury. The evidence is that the agent selling the investment informed Harrison that record participation was limited by Witter to the persons its program was intended to benefit, but because the benefits were of a type that could be shared, there was no prohibition against remitting to cash-providers some of the benefits arising from participations supported by outsiders' funds. It was surely possible to believe that the Kennings and Carpenters, whom Witter sought to attract, would be permitted by their principal

to pass along a portion of the profits to those whose cash made possible direct participations larger than the intended beneficiaries' sole resources would support. Kenning always stressed, and Harrison believed, that Kenning's sole investment in the program was larger than the investments on which he shared profits with people situated as Harrison was. Whether a reasonably prudent person would have so believed are matters for jury determination.

In order for the Seventh Circuit's disposition of the "apparent authority" issue to be sustainable, it requires a stretching of summary judgment practice far beyond any territory it has yet claimed. It implies that the right to a trial by jury can be abrogated because judges, who have not observed witnesses or heard testimony, may decide that more than 100 people who lost more than seven million of their investment dollars acted at a level below the plane at which a reasonably prudent person would have acted. What is reasonable is, and always has been, itself a fact when raised on a Rule 56 motion. *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.*, 925 F.2d 174, 180 (7th Cir. 1991). The Seventh Circuit has consistently held that on questions of motivation and scope of employment the jury must decide the question. *Wilson v. Chicago Milwaukee St. P. & P.R.Co.*, 841 F.2d 1347, 1358 (7th Cir. 1988). This ruling departs from the principles employed by all federal circuits where "apparent authority" is contested. *Lewis v. Walston & Co., Inc.*, 487 F.2d 617, 623-4 (5th Cir. 1973); *Marbury Management, Inc. v. Kohn*, 629 F.2d 705, 716 (2d Cir. 1980).

Illinois held that where evidence of whether an agent is apparently authorized to act is conflicting, it raises a

question of fact to be presented to the jury. *Lynch v. Board of Education of Collinsville*, 82 Ill.2d 415, 412 N.E.2d 447, 456 (1980), followed in *Boden Products, Inc. v. Novachem, Inc.*, 663 F.Supp. 226, 229 (N.D. Ill. 1987). If the principal has created the appearance of authority in the agent, the loss must fall upon the principal rather than on the injured customer. *State Security Ins. Co. v. Burgos*, 583 N.E.2d at 552. Where the injured party had presented evidence of apparent authority, it could not properly have been discounted at the directed verdict stage. *J.W. O'Brien Corp. v. Alloy Piping, Inc.*, 128 Ill.App.3d 978, 471 N.E.2d 985, 988 (2d Dist. 1984). "Only a trial can tell for sure" whether the agent's conduct is so unusual and extraordinary as to absolve the principal under apparent-authority principles. *Evanston Bank v. ContiCommodity Services, Inc.*, 623 F.Supp. 1014, 1038 (N.D.Ill. 1985).

This Court recognized, in a similar context, that assessments of what inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to that "reasonable shareholder", are peculiarly assessments to be made by the trier of fact. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). The formulation is directly applicable to this case. We know what inferences *were* drawn by people who heard of the presentation of this Witter Vice President. The assessment of what a "reasonable investor" would have inferred from this set of facts is peculiarly for the trier of fact, and not for judges deciding a motion for summary judgment.

II. RULE 3(c) AND *TORRES* DO NOT PRECLUDE APPELLATE JURISDICTION RESPECTING RULE 11 SANCTIONS.

Witter claimed the holding of this Court in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) deprived the court of appeals of jurisdiction to review the sanctions. It then cross-appealed claiming the district court should have awarded sanctions in respect to every count pleaded. Before the initial brief was filed, appellants moved to amend their notice of appeal to include the name of their attorney in the body of the notice.

Despite the fact that Fed.R.App.P. 3(c) states, "The notice of appeal shall specify the *party* or *parties* taking the appeal . . . ", the Seventh Circuit held that a person who is not a party, but who was sanctioned as attorney for a party, could not have such sanctions reviewed if through inadvertence his name was not listed in the notice of appeal.

Torres deals with parties only, just as Rule 3(c) does. The *Torres* opinion expressly recognizes that its harsh effect can be obviated by filing an amendment to the notice of appeal.

Based on the *Torres* dictum, the Seventh Circuit suggested a post-filing correction of so non-prejudicial an oversight would be considered. *Leahy v. Board of Trust of Community College Dist. No. 508*, 912 F.2d 917, 923 (7th Cir. 1990) ("Counsel did not file a separate notice of appeal from the district court's Rule 11 order, and has not sought leave to amend the original notice"); *United States v. Spurgeon*, 861 F.2d 181, f.n.3 (8th Cir. 1988). It had permitted such an amendment early in the same month in which

Torres was announced, holding it had jurisdiction as a result of an amendment permitted more than five months after the notice of appeal had been filed in the district court. *Chathas v. Smith*, 848 F.2d 93, 94 (7th Cir., 1988); cert. den. 110 S.Ct. 1169 (1990). The opinion notes that if necessary, the court of appeals could find jurisdiction under the All-Writs Act, 28 U.S.C. § 1651, to amend what is functionally a part of the appellate process even though it is formally a filing in the district court. Id.

Other courts read *Torres* as permitting amendment to notices of appeal where no injustice will result. Two amended notices of appeal were presented, purporting to amend an earlier-filed invalid notice. The amendments were recognized because a notice of appeal should be liberally construed where there is no evidence of prejudice to the appellee. *Davis v. Locke*, 936 F.2d 1208, 1211 (11th Cir. 1991).

Jurisdiction should not turn solely on the text under "Notice of Appeal"; where reference to the lower court proceedings discloses the parties to and scope of an appeal, the policy behind Rule 3(c) has been adequately served. *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1323 (9th Cir. 1991). The desirability of a reading Rule 3(c) less rigidly is especially compelling where the injured person is not a *party*, and the admittedly harsh result is based on a Rule that refers only to a party.

CONCLUSION

The Seventh Circuit correctly reversed summary judgment respecting claims based on Section 20(a) of the Securities Exchange Act of 1934, but it then departed from the controlling case law governing claims based on the common law of agency, and affirmed summary judgment in a striking extension of Rule 56(c) beyond where it has ever reached or ever should reach. In doing so it so far departed from the acceptable and usual course of judicial proceedings on motions for summary judgment that this Court's power of supervision should be exercised to correct the "apparent authority" result. The holding respecting lack of appellate jurisdiction over the Rule 11 sanctions is in conflict with other United States courts of appeals, with the language of Rule 3(c), and declines to recognize the applicable teaching of this Court in the *Torres* case respecting non-prejudicial amendment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

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No. 92-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HUDSON T. HARRISON, HARRISON CONSTRUCTION INCORPORATED, a corporation, and THOMAS P. WARD,

Cross-Petitioners,

v.

DEAN WITTER REYNOLDS INC., a corporation,

Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

On April 29, 1993, Hudson Harrison, Harrison Construction Company (collectively "Harrison") and Thomas Ward, their attorney, filed a Cross-Petition for Writ of Certiorari ("Cross-Petition") seeking review of the Seventh Circuit's holdings that:

(a) On the undisputed facts, no reasonable person would have supposed that Dean Witter[1] had author-

[1] Cross-Respondent Dean Witter Reynolds Inc. is a subsidiary of Sears, Roebuck & Company.

ized the personal loan transactions on which Harrison's claims are based; and

(b) it lacked jurisdiction over Mr. Ward's appeal of an order entering Rule 11 sanctions against him, alone, as he was not named as one of the appealing parties in the required Notice of Appeal.

Dean Witter first received a copy of the Cross-Petition on May 3, 1993.

STATEMENT OF THE CASE

The Seventh Circuit affirmed summary judgments in favor of Dean Witter on nine federal and state law claims premised on the common law theory of apparent authority on the basis that no reasonable person would naturally suppose that Dean Witter had authorized the relevant transactions in light of the following undisputed facts—all of which are conclusively established by Harrison's own documents or sworn testimony:

1. Hudson Harrison, millionaire and sole owner of Harrison Construction Co., is not and never was a customer of Dean Witter. C.App. 1, 42.[2]
2. Harrison was told by Carpenter and Kenning, two Dean Witter employees, that if he loaned funds to them, they would use those funds to buy municipal bonds in their personal accounts at substantial discounts available only to employees (and not to customers) which would allow them to pay Harrison annualized interest rates of from 18 to 60%. C.App. 9, 20 and 21.
3. Harrison and his company made approximately twenty such loans, in the total amount of approx-

[2] References to Cross Appendix ("C.App.") refer to the appendix filed by Dean Witter in the Seventh Circuit that contains the supporting portions of the Record on Appeal.

imately $4 million, all of which were by checks or wire transfers made payable to Carpenter personally and sent to his home or personal bank account. C. App. 10, 13, 15, 18 and 19.

4. As his sole evidence of these transactions, Harrison received the personal promissory notes of Carpenter and Kenning. C.App. 20.

5. Carpenter and Kenning also furnished Harrison with (a) duplicate promissory notes for each of his company's loans that substantially understated the agreed upon and expected return and (b) phony IRS Forms 1099 that substantially understated the interest that Harrison believed he and his company had been paid and that listed "John Carpenter" as the payor of that interest. C.App. 28.

6. Harrison never received any account statements, customer agreements, Forms 1099, checks or any other document from Dean Witter or bearing Dean Witter's name. C.App. 42.

REASONS THE CROSS-PETITION SHOULD BE DENIED

I. INTRODUCTION

The Cross-Petition presents two questions, neither of which raises any issue significant enough to warrant this Court's consideration. By the first question, Harrison simply seeks review of what he characterizes as a mistaken application of a concededly correct statement of the Illinois law of apparent authority. Cross-Petition ("C.P.") at 4, 9. Moreover, the argument advanced in support of this question both misstates the evidence and misapprehends the relevant legal principles. The second question, by which Mr. Ward (Harrison's attorney) would challenge the Seventh Circuit's decision that it lacked jurisdiction over his appeal of an order imposing Rule 11 sanctions

against him, seeks to have this Court overrule its decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). Yet, Mr. Ward's supporting argument raises no issues that would warrant revisiting *Torres*. For these reasons, the Cross-Petition should be denied.

II. HARRISON'S APPARENT AUTHORITY ARGUMENT MISREPRESENTS THE UNCONTROVERTED EVIDENCE AND MISAPPREHENDS THE RELEVANT LAW

Harrison's argument in support of the Cross-Petition's first question rests on three equally false premises. The most surprising of these is the contention that there is no, or insufficient, evidentiary support for the Seventh Circuit's statements that: (1) Harrison was told and expected that the funds he loaned to Dean Witter employees Carpenter and Kenning would be used in Carpenter's personal employee account; and, (2) Harrison expected to receive enhanced returns by benefiting from the lower commissions and other discounts granted only to employees, and not to customers, of Dean Witter. See C.P. at 7 n. 3 and 10-14. As Harrison should certainly be aware, however, his own sworn and uncontroverted testimony provides conclusive evidentiary support for these statements.

The second fallacious premise of Harrison's argument is that, despite the obviously irregular and unorthodox nature of the transactions involved, the issue of apparent authority may not be resolved on a motion for summary judgment. This is simply not the law. As the Seventh Circuit correctly recognized, if a transaction is irregular on its face or appears as if it might be to the detriment of the principal, a plaintiff may not rely on the doctrine of apparent authority under the law of Illinois without in-

vestigating whether the transaction was authorized.[3] Thus, because Harrison admits that he did not investigate whether Carpenter and Kenning were authorized to engage in the highly irregular transactions involved, summary judgment in this case is not only permitted, but required.

The final unsupportable premise of Harrison's argument is that, based on the mere fact that others entered into similar "deals", a jury could excuse Harrison's failure to recognize the obviously unauthorized nature of those "deals". This premise is fatally flawed. First, there is absolutely no evidence in the record as to whether any of these "others" believed that they were dealing with Dean Witter. Yet, such a belief is one of the necessary predicates of Harrison's argument. Second, even if we accept Harrison's unsupported assumption of belief, that belief does not excuse Harrison (or the others) from having failed to investigate Carpenter's and Kenning's authority to enter into transactions which, as evidenced by Harrison's own sworn testimony and documents, were not only irregular but designed to cheat Dean Witter of commissions and the United States Government of taxes.

A. Harrison's Own Testimony Establishes That (1) He Understood That The Funds He Loaned To Carpenter And Kenning Would Be Used In Their Personal Employee Accounts (2) To Dean Witter's Disadvantage And His Benefit

The Seventh Circuit held that no reasonably prudent person would have believed that Dean Witter had author-

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[3] *E.g., Paine v. Sheridan Trust and Savings Bank*, 342 Ill. 342, 349, 174 N.E.2d 368 (1930); *Evanston Bank v. ContiCommodity Services, Inc.*, 623 F.Supp. 1014, 1033 (N.D. Ill. 1985); *see also* Restatement (Second) of Agency §§165 comment c and 166 comments b and c (1958).

ized Carpenter and Kenning to borrow funds from Harrison to use in their own employee accounts in order that Harrison could obtain the benefit of Carpenter's and Kenning's employee discounts. The Cross-Petition asserts, however, that there is no evidence that Harrison understood that his funds would be used in Carpenter's personal employee account or that he expected to benefit from employee discounts to which he was not entitled. C.P. at 7 n. 3 and 10-12. These assertions are so far off the mark that one wonders what record is being referenced.

1. Harrison testified several times that he understood that any funds he loaned to Carpenter and Kenning would be used in their personal employee accounts

The Cross-Petition asserts that "[t]here is no evidence that Harrison or anyone else was told that the money [Carpenter and Kenning borrowed from him] would be placed in Carpenter's employee account at [Dean] Witter. . . ." C.P. at 7 n. 3. This assertion is baseless.

In recounting how Carpenter and Kenning explained the transactions to him, Harrison testified as follows:

> Q. Now, did [Carpenter or Kenning] . . . tell you that [the bond transactions would be] . . . done in [Carpenter's or Kenning's] . . . personal account?
>
> A. It was my understanding it was done in their personal account at Dean Witter.

See Appendix, Exhibit A.[4] In explaining why he sent all of his checks and wire transfers to Carpenter's home or

[4] The cited portions of Harrison's testimony appear in the Record on Appeal at Docket Nos. 223-3 and 223-4. Copies of this testimony are also included in the Appendix hereto.

personal bank account, Harrison reiterated this understanding:

> Q. Did Mr. Carpenter ever give you any explanation as to why he wanted the checks sent to his personal [bank] account or to him at his home?
>
> . . .
>
> A. Because these [bond] transactions were being done in his personal account at Dean Witter, he preferred to have the checks sent to him personally.

Appendix, Exhibit B. This testimony is not ambiguous. Nor is there any contrary testimony. Thus, the assertion that there is "no evidence" for the statement that Harrison loaned funds to Carpenter and Kenning to be used in Carpenter's personal employee account is simply false.

2. Harrison's own uncontradicted testimony also establishes that he expected to increase his profits by obtaining the benefit of employee discounts to which he was not entitled

Harrison also asserts that the Seventh Circuit's statement that he expected to benefit from the lower commissions charged Dean Witter employees but that were not available to customers "is factually flawed." C.P. at 11. Once again, it is Harrison's assertion, not the Seventh Circuit's statement, that is flawed.

Immediately following his testimony that he understood that the bond transactions Carpenter and Kenning were proposing were to be "done" in their personal employee accounts, Harrison stated, under oath, as follows:

> Q. Did you ask or were you told why it had to be done in their account as opposed to in your account?
>
> A. Yes.

Q. Or an account that you would open?

A. The reason was that the difference in the commissions made it a more lucrative profit on the bonds.

Q. What commissions are you referring to?

. . .

A. I understood that in their own accounts, they did not pay commissions or were not charged commissions. Therefore, they could buy them at the lower price than they would charge a customer.

Q. So you could do this same thing with Dean Witter directly but to avoid paying commissions to Dean Witter, they suggested that you do it through them personally?

. . .

Q. Is that what was said to you?

A. That was part of it, yes, I believe. Well, that was my understanding of it.

. . .

Q. To avoid having to pay commissions to Dean Witter, you would do it through their account?

A. I don't think they stated it to avoid, they said that's the way it worked.

Appendix, Exhibit C.

Thus, Harrison's own sworn testimony provides unambiguous, unequivocal and uncontroverted evidence for the truth of the statement that Harrison asserts is "flawed". Yet, Harrison would totally disregard this testimony, indeed assume that it does not exist, and substitute an involved explanation of the "real" economics of bond transactions and the commissions charged by broker-dealers. *See* C.P. at 11-14. Harrison offers absolutely no factual support for this "tale", however. Moreover, even if his tale was supported by evidence, the obvious irrelevance

of any post-suit education Harrison may have received (as opposed to the critical relevance of his contemporaneous understanding of the transactions at issue) highlights the baselessness of the Cross-Petition's argument that the Seventh Circuit's apparent authority holding was not firmly and correctly founded upon the actual and undisputed facts of this case.

B. Summary Judgment Is Not Only Permitted But Required Where The Material Facts Are Not In Dispute And No Reasonable Juror Could Legally Sustain The Claim At Issue In Light Of Those Facts

Harrison does not dispute that the correct legal principles were applied in deciding the apparent authority issues. C.P. at 4. Rather, he argues that the Seventh Circuit incorrectly applied these principles and impermissibly resolved jury questions concerning the unusual and extraordinary nature of his transactions with Carpenter and Kenning. C.P. at 4, 8-16. Before Harrison can legitimately ask that such issues be submitted to a jury, however, he must be able to point to some *evidence* upon which the jury could decide the issue in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). This is something he cannot do.

For example, what evidence did Harrison adduce in over two years of discovery that could possibly support a conclusion that it was usual and customary, in the ordinary course of the securities business, for a broker-dealer to authorize its account executives to:

1. Share their employee discounts with non-employees to the disadvantage of their employer;
2. Instruct customers to make millions of dollars in payments to them personally, rather than to the firm, and to send those payments to their personal residences or bank accounts;

3. Issue their own personal promissory notes as the sole evidence of transactions in which the firm was involved;
4. Not issue the customary and usual account statements, confirmations, IRS Form 1099's and other documents; or
5. Issue phony duplicate promissory notes and phony IRS forms that substantially understated the agreed upon return and that listed the employee (rather than the firm) as the sole payor of such returns.

The answer, of course, is none—no affidavits, no expert or non-expert testimony, no Dean Witter documents, no treatises, no anything. Common sense tells us why; the transactions Carpenter and Kenning proposed were not usual and ordinary but decidedly irregular and illegal attempts to defraud Dean Witter. No reasonable juror could conclude otherwise on the basis of any *evidence* presented in this case. Therefore, the Seventh Circuit correctly decided that Dean Witter was entitled to summary judgment on the issue of apparent authority, as a matter of *law*.

C. The Simple Fact That Others Entered Into Transactions With Carpenter And Kenning Does Not Establish That These Others Believed That They Were Dealing With Dean Witter, Much Less That Any Such Belief Was Reasonable

The final premise of Harrison's argument is the fact that others entered into similarly irregular transactions is evidence that it was reasonable for him to have believed that Dean Witter had authorized his transactions. C.P. 4, 9-10. This argument exhibits the same basic misunderstanding of the role, indeed the concept, of evidence as do Harrison's other arguments.

The most fundamental flaw in Harrison's argument is that it is founded upon the assumption that all of the "others" believed that they were dealing with Dean Witter. There is absolutely no *evidence* in the record, however, concerning what any of the others believed. The mere fact that Harrison and others entered into the transactions does not constitute proof that any of them believed that they were dealing with Dean Witter, given that those transactions were so obviously designed to defraud Dean Witter of commissions.

A second necessary (and equally faulty) predicate of Harrison's argument is that any belief shared by as many as 126 people is presumptively reasonable. Harrison cites no law that suggests that such a presumption is appropriate. Nor does human experience support giving Harrison the benefit of such an inference. Moreover, in this case, any such presumption would be overwhelmingly rebutted by the uncontroverted evidence provided by Harrison's own documents and sworn testimony which conclusively establish the extremely irregular and unorthodox nature of the transactions at issue.

D. Conclusion

On the undisputed facts of this case, Harrison had more than ample notice that *his* transactions with Carpenter and Kenning were anything but regular. Consequently, under well-settled law that Harrison concedes the Seventh Circuit correctly identified, he had a duty to take reasonable steps to protect himself by investigating whether those transactions were, in fact, authorized by Dean Witter. Harrison admits that he did not conduct any such investigation. Therefore, the Seventh Circuit correctly decided that Dean Witter was entitled to summary judgment on the issue of apparent authority and Harrison's petition for review of that decision should be denied.

III. MR. WARD ADVANCES NO ISSUE IN SUPPORT OF THE CROSS-PETITION'S SECOND QUESTION THAT WARRANTS RECONSIDERATION OF THIS COURT'S DECISION IN *TORRES v. OAKLAND SCAVENGER CO.*, 487 U.S. 312 (1988)

The Notice of Appeal filed in this case on March 1, 1991 stated, in relevant part, that:

> Hudson T. Harrison and Harrison Construction, Inc., plaintiffs above-named, hereby appeal . . . from the final judgment . . . entered in this action on the 6th day of February, 1991.[5]

On June 10, 1991, Harrison filed his initial brief in the appeal, which included arguments addressed to the Rule 11 sanctions imposed solely against Mr. Ward in orders entered on June 28, 1990 (finding violations) and October 19, 1990 (setting the amount of the sanction). Also on June 10, 1991, Harrison filed a Motion to Amend the Notice of Appeal to add Mr. Ward as a named party/appellant. This motion was filed 94 days after the time (March 8, 1991) for filing an appeal under Federal Rule of Appellate Procedure 4(a)(1) had expired. On these facts, the Seventh Circuit held that, under *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), it lacked jurisdiction to hear any appeal of the Rule 11 orders or to consider the Motion to Amend. Mr. Ward petitions this Court to review this decision, claiming that it misconstrues *Torres* and is in conflict with the law of other Circuits. Mr. Ward is wrong on both counts.

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[5] The Notice of Appeal appears in the Record on Appeal at Docket No. 227.

Mr. Ward's first argument, also raised below, is premised on the contention that the result in *Torres*[6] turned on the fact that the party not named as an appellant in the notice of appeal had also failed to seek leave to amend that notice. As the Seventh Circuit recognized, however, "[t]he *Torres* Court actually stated, 'Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4.' "[7] *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 886 (7th Cir. 1992) (quoting *Torres*, 487 U.S. at 317). Mr. Ward also did not seek leave to amend the notice of appeal "within the time limits set by Rule 4". Therefore, his argument that the Seventh Circuit's decision misconstrues *Torres* has no basis.

Second, the cases Mr. Ward cites as evidence of a conflict among the circuits are completely inapposite. For example, in *Davis v. Locke*, 936 F.2d 1208 (11th Cir. 1991), the appellant's notice of appeal was filed prematurely, but a subsequent "amendment" to the notice was filed within the appropriate Rule 4 time limits for perfecting an appeal. On these facts, *Davis* held that the subsequent filing could be construed as constituting the required notice, despite its being styled an "amendment" to the premature and invalid notice—not that untimely amendments to add a party-appellant may be allowed.

Similarly, *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991), is not, in any way, at odds with the

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[6] *Torres* held that a secretary's inadvertent omission of one of sixteen plaintiffs names in the list of the parties appealing included in the Notice of Appeal deprived the Court of Appeals of jurisdiction over the omitted plaintiff's appeal.

[7] The Seventh Circuit opinion is cited in full text at Appendix A of Dean Witter's Petition for Writ of Certiorari.

decision in this case. *Gilbreath* simply held that a timely notice stating that "all plaintiffs" were taking the appeal was sufficient to perfect an appeal on behalf of "all plaintiffs", despite the fact that each plaintiff was not individually named as an appellant in the body of the notice. 931 F.2d at 1323.

Finally, Mr. Ward argues that the naming requirements of Rule 3(c) should be enforced less rigidly "where the injured person is not a *party*, and the admittedly harsh result is based on a Rule that refers only to a party." C.P. at 18 (emphasis in original). If Mr. Ward was misled by Rule 3(c)'s reference to "party or parties taking the appeal", he should not have been. Shortly after *Torres* was decided, the Seventh Circuit dismissed an appeal of a sanctions order for lack of jurisdiction because the real party-in-interest, the sanctioned attorney, had not been named as a party-appellant in a timely Notice of Appeal. *Rogers v. National Union Fire Ins. Co.*, 864 F.2d 557, 559-60 (7th Cir. 1988); *see also Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1254 (7th Cir. 1989).

The Seventh Circuit's decision—that the failure of the Notice of Appeal to identify Mr. Ward as one of the "parties taking the appeal" deprived it of jurisdiction to hear his appeal or his untimely motion to amend falls squarely within the dictates of *Torres*. As *Torres* stated:

> We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

487 U.S. at 315. Mr. Ward has raised no legitimate issue warranting reconsideration of this decision. Consequently, the Cross-Petition should be denied.

Respectfully submitted,

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APPENDICES

EXHIBIT A

[Harrison Deposition p. 476, lines 1-5; C.App. 9]

Q. Now, did whoever this was that you were talking to on the phone tell you that this was done in the person's personal account?

A. It was my understanding it was done in their personal account at Dean Witter.

EXHIBIT B

[Harrison Deposition p. 547, lines 6-14; C.App. 10]

MR. UHLENHOP: Q. Did Mr. Carpenter ever give you any explanation as to why he wanted the checks sent to his personal account or to him at his home?

A. I believe that's been asked before.

Q. No. Would you please answer the question.

A. Because these transactions were being done in his personal account at Dean Witter, he preferred to have the checks sent to him personally.

EXHIBIT C

[Harrison Deposition p. 476, lines 6-24 and p. 477, lines 1-14; C.App. 9]

Q. Did you ask or were you told why it had to be done in their account as opposed to in your account?

A. Yes.

Q. Or an account that you would open?

A. The reason was that the difference in the commissions made it a more lucrative profit on the bonds.

Q. What commissions are you referring to? I don't understand that.

A. I understood that in their own accounts, they did not pay commissions or were not charged commissions. Therefore, they could buy them at the lower price than they would charge a customer.

Q. So you could do this same thing with Dean Witter directly but to avoid paying commissions to Dean Witter, they suggested that you do it through them personally?

MS. PEZANOSKI: Objection, ambiguous and calls for speculation.

MR. UHLENHOP: Q. Is that what was said to you?

A. That was part of it, yes, I believe. Well, that was my understanding of it.

Q. That's what they told you to the best of your knowledge?

A. Yes.

Q. They being Mr. Carpenter or Mr. Kenning whoever was on that phone?

A. Right.

Q. To avoid having to pay commissions to Dean Witter, you would do it through their account?

A. I don't think they stated it to avoid, they said that's the way it worked.
